IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

FRIDAY, THE 10TH NOVEMBER 2006 / 19TH KARTHIKA 1928

CRL.A.No. 2142 of 2006()

AGAINST THE ORDER DATED 04/07/2006 IN CRMC. 63 /2006 IN SC.464/2006 of ADDL. SESSIONS COURT (ADHOC), KOLLAM

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APPELLANT: COUNTER PETITIONERS 2, 3:

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1. THANKAMONY,
DEEPA BHAVANAM, KUNNATHOOR VILLAGE,
KOLLAM DISTRICT.

2. PATHROSE JOSEPH,
CHARUVILA MELATHIL VEEDU,
THURUTHIKKARA, KUNNATHOOR VILLAGE,
KOLLAM DISTRICT.

BY ADV. SRI.PRATHEESH.P

RESPONDENTS: PETITIONER

STATE OF KERALA REPRESENTED BY
SUB INSPECTOR OF POLICE, KUNNATHOOR, THROUGH
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
AT ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.C.M.NAZAR

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 10/11/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.HEMA, J.

CRL.A.NO.2142 of 2006

Dated this the 10th day of November, 2006

JUDGMENT

This appeal arises from an order passed under Section 446(1) of the Code of Criminal Procedure ('the Code', for short). Appellants are sureties of the accused in a sessions case. They executed a bond for appearance of the accused before the court. The court found that the accused was reported to be absconding and hence the bail was cancelled. Thereafter notice was issued to the sureties and there was no representation for them. Therefore, the bond was forfeited and the appellants were directed to remit Rs.10,000/- each as penalty under Section 446(3) of the Code. On failure to remit the penalty, appellants were sentenced to undergo one month imprisonment in civil prison. The said order is under challenge in this appeal.

2. Learned counsel for the appellants submitted that the accused appeared before the court subsequently and that the appellants had not actually received notice from the court. But they could not bring the relevant facts to the notice of the trial court. Though the court recorded that the appellants received notice, as a matter of fact, the appellants had not noticed of the proceedings and hence there was no representation on their behalf, it is submitted.

3. On going through the order under challenge, I find that there is nothing therein to show that it is proved to the satisfaction of the court that the bond has been forfeited. The court has only recorded that the accused

is "reported to be absconding". But whether such report is acceptable or not, does not find a place in the order. As per Section 446(1) of the Code, if it is proved to the satisfaction of the court that the bond has been forfeited, the court shall record the grounds of such proof and only thereafter the court shall proceed against the person who committed such breach of the bond. But the court has not complied with the mandatory requirements under Section 446(1) of the Code. Therefore, the order under challenge is illegal on this count itself.

4. There is also nothing in the order to show that the appellants who were called upon to pay the penalty (which has incurred because of the default on the part of the accused) or to show cause why penalty shall not be paid. Without giving sufficient opportunity to pay penalty or show cause for non-payment of the penalty, the court cannot proceed to direct payment of penalty as revealed from sub-section (2) of Section 446 of the Code. The court has not applied its mind to any of the requirements under Section 446 of the Code before passing order to remit the penalty.

5. The order sentencing the appellants to civil prison for one month at a premature stage is also illegal. The court can sentence a person to civil prison and fix a proper sentence only if the person who commits breach of the bond is given sufficient opportunity to pay the penalty. Even without giving an opportunity to make the payment, or to take steps to recover the penalty, the court shall not sentence a person to civil prison because, depending upon the amount paid or recovered, there shall be a difference in

the period of sentence to be imposed. So, order is illegal on this count also.

6. In the result, the impugned order is set aside. The trial court is directed to take the case on file and dispose of the same in accordance with law, in strict compliance of the provision contained in Section 446 of the Code. The appellants shall appear before the trial court on 11.12.2006.

This appeal is admitted with notice to the Public Prosecutor. Heard both sides and it is allowed.

K.HEMA, JUDGE

vgs.